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MANIA K. BAGHDADI
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STEPHEN R. ROSS
TIMOTHY R. SCHNACKE**
LONNA M. THOMPSON
HOWARD M. WEISS
*ADMITTED IN TEXAS ONLY
**ADMITTED IN KANSAS ONLY

FLETCHER, HEALD & HILDRETH

ATTORNEYS AT LAW

SUITE 400, 1225 CONNECTICUT AVENUE, N.W.

WASHINGTON, D.C. 20036-2679

(202) 828-5700

TELECOPIER NUMBER

(202) 828-5786

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PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)

RETIRED
RUSSELL ROWELL
EDWARD F. KENEHAN
ROBERT L. HEALD
FRANK U. FLETCHER

TELECOMMUNICATIONS CONSULTANT
HON. ROBERT E. LEE

WRITER'S NUMBER
(202) 828-5718

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FILE

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: MM Docket No. 91-221


Dear Ms. Searcy:

Transmitted herewith on behalf of WNAL-TV, Inc., licensee of WNAL-TV, Channel 44, Gadsden, Alabama, are an original and four (4) copies of its "Comments" with respect to the above-referenced proceeding.

Should there be any questions concerning this matter, please communicate with the undersigned.

Very truly yours,

FLETCHER, HEALD & HILDRETH


Howard M. Weiss
Counsel for WNAL-TV, Inc.

Enclosure

cc: Barbara A. Kreisman, Esquire (w/enc.) (by hand)
Clay Pendarvis, Esquire (w/enc.) (by hand)

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of

Review of the Commission's
Regulations Governing Television
Broadcasting

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) MM Docket No. 81-221
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Directed to: The Commission

AUG 24 1992

Federal Communications Commission
Office of the Secretary

COMMENTS OF WNAL-TV, INC.

WNAL-TV, Inc., licensee of WNAL-TV, Channel 44, Gadsden, Alabama, by its attorneys, hereby submits its Comments with respect to the FCC's Notice of Proposed Rulemaking (FCC 92-209, released June 12, 1992) ("NPRM") in the above-captioned proceeding. In support thereof, the following is stated:

WNAL-TV has been a locally-owned and operated UHF independent television station since its construction and commencement of operations in April of 1986, following years of unsuccessful attempts by a variety of other parties to activate Channels 44 and 60 in Gadsden. The station, which employs fewer than 20 people (only 13 of which are full-time), focuses its local programming and sales efforts on the city of Gadsden and Etowah County. WNAL-TV has no national sales accounts or national sales representation.

Gadsden, population 42,523 (1990 U.S. Census), is 66 miles from Birmingham, Alabama. However, most of the Birmingham television stations place a Grade B contour over WNAL-TV's service area and sell advertising there. For this and related reasons, Arbitron has included Gadsden within the Birmingham ADI (the 50th largest in the United States), even though WNAL-TV cannot

technically and does not attempt practically to compete with the Birmingham stations for programming or advertising dollars. If Gadsden were to be considered a separate market, it would of course rank well below the top 100 ADI's. Hence, WNAL-TV is, in the truest sense, an overshadowed "fringe market" UHF station. It is forced to compete in a situation which is the worst of both worlds, doomed to at best operating on the financial margin.

WNAL-TV therefore enthusiastically endorses the Commission's proposal to modify its television duopoly rule to afford UHF stations an opportunity to consolidate in order to achieve greater economic efficiencies and, consequently, greater competitiveness in their market. These efficiencies would, in WNAL-TV's view, permit survival of the small-market UHF stations as non-satellite media outlets. Better yet, they would produce reinvestment in news gathering and other resources which are necessary for UHF stations to compete with multichannel service providers while broadcasting local programming focused on their communities' needs and interests. The FCC has perceptively recognized both in the NPRM and in its recent decision to relax the radio ownership rules that allowing ownership of more than one station in a market (or region) would permit beneficial merger of administrative, news gathering and production functions. NPRM at 10; Revision of Radio Rules and Policies, 7 FCC Rcd 2755, paras. 32, 37-38 (1992), reconsidered in part, 7 FCC Rcd ____ (1992). The need for such efficiencies is especially acute for UHF stations in smaller remote markets like Gadsden, where cable television enjoys exceedingly high penetration and cable-carried distant signals and networks are therefore strong

competitors for viewership and advertising revenues.¹

On the other hand, the likelihood that common ownership of UHF stations would result in undue market concentration is very remote in overshadowed smaller markets like Gadsden which receive substantial off-air service from VHF television stations in a nearby larger market, have pervasive cable service, and also receive service from a large number of radio stations and newspapers. Simply put, there is little opportunity for commonly owned UHF stations to monopolize public opinion or enjoy excess economic power if there are numerous other independently owned media voices either in the market or coming into the market.

Accordingly, to allow UHF stations maximum opportunity to achieve the efficiencies and competitiveness desired by the FCC, WNAL-TV recommends that the FCC, in the absence of facts concretely establishing regional concentration of control, allow common ownership of UHF stations in all television markets irrespective of the extent of Grade B contour overlap. Limiting such common ownership to major markets will not help the struggling smaller market UHF stations whom the FCC has already recognized are in

¹ FCC records indicate that cable penetration in Gadsden is 94%. Also, there are numerous MMDS applications pending at the FCC for the Gadsden market. If MMDS service becomes a reality in Gadsden, WNAL-TV can expect even more competition for viewership and advertising dollars.

greatest need of relief.² WNAL-TV recommends that any UHF station licensee which applies to the FCC for authority to acquire a second UHF station under these circumstances be entitled to a rebuttable presumption that the proposed combination will not result in undue concentration of control. This rebuttable presumption would place the burden of proving otherwise where it belongs, i.e., on any party petitioning to deny the subject application.

In the alternative, if the FCC is concerned that commonly owned UHF stations serving common areas may enjoy undue market power in some markets notwithstanding the stations' financial condition, WNAL-TV recommends that the FCC permit common ownership of two UHF stations unless the Grade B overlap area receives fewer than five other television services or unless 25% or more of the area within the acquired station's Grade B contour but outside the acquiring station's Grade B contour receives fewer than five other television services. Under either test, "other television services" should include educational, regular TV, TV satellite, low power television and translator stations.³ Again, any applicant

² Indeed, the FCC has noted that at least 50% of independent stations in all market classes below the top ten have been losing money. NPRM at 4.

³ The FCC recently adopted the 25% test for the purpose of determining whether an area served by a proposed television satellite station is underserved and therefore in need of a satellite station. Television Satellite Stations; Review of Policy and Rules, 6 FCC Rcd 4212, 4215 (1991). Also, the inclusion of noncommercial stations would be consistent with the FCC's decision in Channel 32

which can meet this test should be entitled to a rebuttable presumption that the proposed combination of UHF stations would not result in an undue concentration of control. In the event that the applicant cannot meet this test, the FCC should permit the applicant to demonstrate via other information that the proposed combination would not in fact result in excess concentration of control.⁴

WNAL-TV submits that the above-described tests will ensure compliance with the FCC's previously stated requirement that the overlap area have access to enough off-air service so that the proposed combination will have no cognizable effect on market diversity. See, e.g., Capital Cities Communications, Inc., 59 R.R.2d 451, 465 (1985) ("[I]n view of the multiple signals available in the overlap area, we conclude that the circumstances here are unlikely to permit common ownership . . . to be used in a

Broadcasting Company, 6 FCC Rcd 5188 (1991), recon. denied, 7 FCC Rcd 1694 (1992), where the FCC declared that in a comparative television broadcast proceeding, noncommercial television stations are to be included in the determination of underserved areas.

⁴ This is similar to the approach the FCC recently adopted in its recent reconsideration of its Report and Order modifying the radio ownership rules. There, the FCC stated that it would allow an entity proposing to exceed the local radio ownership limits in larger markets to make a similar showing, in the event that market data reflects that the proposed combination will result in a combined market share of 25% or more. FCC Public Notice, MM Docket 91-140 (released August 5, 1992).

manner to exercise an inordinate effect on public opinion or to achieve any undue concentration of economic power"). In the vast majority of cases, a five-signal test, whether applied in the overlap area or in the acquired station's non-overlapped Grade B contour, will provide a diverse enough complement of signals (i.e., at least one affiliate of the three networks plus Fox) to prevent anti-competitive behavior in the market.

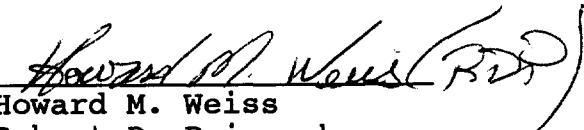
Finally, should the FCC decide not to adopt any of WNAL-TV's proposals, WNAL-TV requests that the FCC formally adopt a rule authorizing temporary waivers of the television duopoly rule for UHF stations, permitting common ownership of UHF stations for up to twelve months and thereby allowing sufficient time for any divestiture required by the FCC. The FCC currently handles requests for such temporary waivers on a case-by-case basis, and has ruled that such waivers do not result in undue concentration of control where there are a number of other independent voices in the market, even if the amount of contour overlap is not de minimis. See, e.g., Citadel Communications Co., Ltd., 67 R.R.2d 1605 (1990), and Family Television Corp., 59 R.R.2d 1344 (1986). However, a rule institutionalizing these precedents and authorizing temporary waivers would add greatly needed certainty to the waiver process, stimulate transactional activity, and lessen the likelihood that a divesting UHF station owner will have to sell at

a "fire sale" price.⁵ No countervailing public interest detriments are apparent.

Respectfully submitted,

WNAL-TV, INC.

By:


Howard M. Weiss
Robert D. Primosch

FLETCHER, HEALD & HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20554
(202) 828-5700

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⁵ Indeed, given the state of the market for stand-alone independent UHF television stations in small markets, a rule authorizing an eighteen month waiver period would not be unreasonable.